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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1073

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, ET AL., APPELLANTS

v.

THE CALIFORNIA BANKERS ASSOCIATION, FORTNEY H. STARK, JR., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (App. 75-93) is reported at 347 F. Supp. 1242.

JURISDICTION

The order of the three-judge district court, which declared Sections 221-223 of Chapter 2 of Title II of the Act of October 26, 1970, 84 Stat. 1114, 1118 (hereafter the Bank Secrecy Act)[1] to be unconstitutional

[1] The Act of October 26, 1970, *supra*, has no official title but is popularly known as the Bank Secrecy Act. Title II of the Act is officially entitled the Currency and Foreign Transactions Reporting Act (Section 201).

and which preliminarily enjoined the enforcement of these Sections and regulations promulgated thereunder by the Secretary of the Treasury (31 C.F.R., Part 103, Subparts B and D), was entered on October 18, 1972 (App. 94–95). Notices of appeal were filed by the defendants on November 13, 1972 (App. 98–99), and probable jurisdiction was noted on October 9, 1973 (App. 104). The jurisdiction of this Court rests on 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether it was proper for the court below to entertain a facial challenge to the constitutionality of Sections 221–223 of the Bank Secrecy Act, at the behest of private parties who failed to allege or show that these Sections, as applied, violated their Fourth Amendment or other rights.

2. Whether Sections 221–223 of the Bank Secrecy Act, as implemented by Treasury Regulations[2] requiring financial institutions to file reports with the Secretary of the Treasury concerning currency transactions involving more than $10,000, except routine transactions by established customers, violate the Fourth Amendment or other constitutional provisions.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Bank Secrecy Act (Sections 101, 102, 121–129, 201–213, 221–223, 231–235, 241 and 242, 12 U.S.C. 1829b, 1951–1959; 31 U.S.C. 1051–1062, 1081–1083, 1101–1105, 1121–1122) and the Regulations thereunder (31 C.F.R. 103.11, 103.21–

[2] 31 C.F.R. 103.22. See Treasury Regulations on Financial Recordkeeping and Reporting of Currency and Foreign Transactions (31 C.F.R.) Part 103 (37 Fed. Reg. 6912).

103.26, 103.31–103.37 and 103.41–103.50), together with Section 5(b) of the Trading With the Enemy Act, 40 Stat. 415, as amended (12 U.S.C. (1940 ed., Supp. V) 95a), are set forth at pp. 69–130 of the Appendix to the Jurisdictional Statement. Section 251 of the Revised Statutes (31 U.S.C. 427) and pertinent Regulations issued under the Trading With the Enemy Act (31 C.F.R. 102.1–102.4) are set forth in App., *infra*, pp. 43–44.

STATEMENT

This is an appeal from an order of a three-judge district court holding Sections 221–223 of the Bank Secrecy Act (84 Stat. 1114, 1118) to be facially "repugnant to Amendment IV of the Constitution" (App. 94) and enjoining their enforcement and the enforcement of regulations promulgated thereunder by the Secretary of the Treasury (31 C.F.R., Part 103, subparts B and D).[3]

A. THE BANK SECRECY ACT: A BRIEF OVERVIEW

The Bank Secrecy Act was enacted in 1970 following extensive hearings concerning the unavailability of foreign and domestic bank records of customers engaged in illegal activities. The Act was designed to reduce white collar crime by making such records more accessible to law enforcement officials. In order to obtain maximum specificity and flexibility, the Act authorizes the Secretary of the Treasury to prescribe

[3] In No. 72–985 and No. 72–1196 the plaintiffs have appealed from that portion of the district court's decision upholding the constitutionality of the remainder of the Act. The government's brief in those cases, which are consolidated for argument with the present case, will be filed separately.

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certain bank recordkeeping and reporting requirements; pursuant to this statutory authority, the Secretary has promulgated specific implementing Regulations. The Act and Regulations are designed to obtain financial information having a "high degree of usefulness in criminal, tax or regulatory investigations or proceedings" (H. Rep. No. 91–975, 91st Cong., 2d Sess., p. 10) through three main provisions.

First, Title I of the Act and the implementing Regulations require financial institutions to maintain records of their customers' identities, to make microfilm copies of checks and similar instruments, and to keep records of certain other items. The provisions give government agencies no additional access to such records, which may be obtained only through the usual subpoena or summons procedures.

Second, Section 231 of Title II and the applicable Regulations require reports of transportations of currency into or out of the country, except nonphysical transportations through normal banking channels. In addition, Section 241 of Title II and the Regulations require individuals with bank accounts or other relationships with foreign banks to provide limited information on a tax return form.

Third, Section 221 of Title II, which along with two related sections (Sections 222–223) was the only part of the Act held unconstitutional, grants to the Secretary of the Treasury the authority to require reports of "[t]ransactions involving any domestic financial institution * * * if they involve the payment, receipt or transfer of United States Currency, or such other monetary instruments as the Secretary may specify,

in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe". These reports may be required from the domestic financial institution involved or the parties to transactions (Section 222), and the Secretary may also designate certain financial institutions to receive the reports (Section 223). Under the Regulations promulgated by the Secretary, however, only financial institutions must file reports with the Internal Revenue Service and they must do so only where the transaction involves the deposit, withdrawal, exchange or other payment of *currency* in excess of $10,000. 31 C.F.R. 103.22 (a). The Regulations exempt several types of currency transactions from the reporting requirement, the most important of which are transactions "with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned." 31 C.F.R. 103.22(b).

B. THE COMPLAINANTS

1. The California Bankers Association is an association of 158 state and national banks doing business in California (App. 9). The complaint filed by the Association did not allege that any provision of the Bank Secrecy Act violated any Fourth Amendment right of *its members* against unreasonable searches and seizures, nor did it specifically challenge the Regulations promulgated by the Secretary of the Treasury which required its member banks to file reports involving currency transactions or payment of currency in ex-

cess of $10,000. The only regulation the Association challenged was 31 C.F.R. 103.45(a), since modified, under which the Secretary of the Treasury reserved the right to alter the regulations which he had promulgated. This discretionary power, the Association alleged, "threatens to deprive members of their constitutional right of due process and equal protection under the Fifth Amendment * * * and is a void delegation of legislative power and/or an excessive exercise of legislative power previously delegated * * *" (App. 12).

2. A second complaint was filed on behalf of a number of separate plaintiffs including (to the extent here relevant) the Security National Bank, its president and customer Fortney Stark, Jr.; a customer of another bank, one Charles Marson; and the American Civil Liberties Union of California. These plaintiffs, like the California Bankers Association, did not specifically allege that the regulation requiring banks to report currency transactions in excess of $10,000 violated any Fourth Amendment rights which they enjoyed.

a. The claim of the individual plaintiffs regarding Sections 221–223 of Title II was that, given the broad provisions in Title I which require extensive recordkeeping, the authority delegated to the Secretary in Title II to compel disclosure of information by the banks (allegedly including copies of all personal checks drawn by depositors) could be exercised in a manner which would violate their right "to be free from unreasonable searches and seizures under the Fourth Amendment" and also cause them to suffer a "chilling effect upon their right of association as

guaranteed by the First Amendment * * * and an abridgment of their constitutional right of privacy" (App. 69, 70).

b. The American Civil Liberties Union, which alleged generally that if the Act and Regulations are permitted to come into effect it "will no longer be able to reasonably and effectively maintain the anonymity of its members and contributors" (App. 68), did not make any Fourth Amendment claim nor did it state how the provisions of Title II as applied here could have the effect it alleged.

c. The Security National Bank likewise made no allegation that any provision of the Bank Secrecy Act or the Regulations violated any Fourth Amendment right to which it was entitled nor did it claim that any of its constitutional rights were violated (App. 68).

C. THE DECISION BELOW

The district court unanimously upheld the constitutionality of the recordkeeping requirements of Title I and the accompanying Regulations (App. 75–82), and the requirements of Title II and the Regulations requiring reports concerning the import and export of currency and monetary instruments and relationships with foreign financial institutions (App. 77–79). Although thus upholding the provisions dealing with foreign financial transactions, the court concluded, with one judge dissenting (App. 93), that the domestic currency transaction reporting provisions of Sections 221–223 are on their face "repugnant to Amendment IV of the Constitution" (App. 94). In the court's view, these provisions could authorize—

although the Regulations do not do so—the Secretary to require detailed reports of virtually all domestic financial transactions, including those involving personal checks and drafts (App. 80), and could conceivably be administered in such a way as to compel disclosure of "details of [a customer's] personal financial affairs not shown on either the bank's own records or on the face of the customer's checks" (App. 86). The court for this reason enjoined enforcement of these provisions by implementation of the Regulations issued thereunder or otherwise without ruling on the question whether the Regulations themselves violate the Fourth Amendment or any other constitutional provision (App. 94–95).

ARGUMENT

I. INTRODUCTION AND SUMMARY

The Bank Secrecy Act was enacted by Congress in 1970 following extensive hearings on the widespread use by United States citizens and residents of foreign bank accounts in bank secrecy jurisdictions for the purpose of concealing violations of United States laws or the fruits of such violations and on the failure of some domestic financial institutions to maintain adequate records of checking account transactions and the identity of the customers.[4] See, general-

[4] Included among the varied illicit uses of secret foreign bank accounts found by Congress were illegal trading in gold, manipulation of United States securities markets, violation of the Securities and Exchange Commission rules on "insider trading," evasion of federal income taxes (for example, by concealing realization of gain on sales of securities held through foreign banks), and concealing funds generated from illegal gambling and narcotics operations. See S. Rep. No. 91-1139, *supra*, pp.

ly, Hearings before the House Committee on Banking and Currency on Foreign Bank Secrecy and Bank Records, 91st Cong., 1st and 2d Sess. (hereafter House Hearings), and Hearings before the Senate Subcommittee on Financial Institutions of the Committee on Banking and Currency on Foreign Bank Secrecy, 91st Cong., 2d Sess. (hereafter Senate Hearings). The purpose of the legislation, as indicated by the Senate Committee Report, (S. Rep. No. 91–1139, 91st Cong., 2d Sess., p. 1) is "to provide law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime." See also H. Rep. No. 91–975, *supra*, p. 10.

While the overall purpose of both Titles I and II of the Act is thus the same, Title I generally deals with recordkeeping and Title II generally deals with reporting.

(i) Title I of the Act authorizes the Secretary of the Treasury to require domestic banks and other domestic financial institutions to maintain records which "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings" (Sections 101, 121). Pursuant to this and somewhat more specific authorizations contained in Title I,[5] the Secretary has prescribed Regulations requiring banks insured under the Federal Deposit Insurance Act to maintain records and other evidence of the identities of their customers, to make microfilm copies of checks

3–4. Another area of concern was the use of foreign banks to circumvent margin requirements on the purchase of United States securities. S. Rep. No. 91–1139, *supra*, pp. 9–10. Title III of the Act, which deals with this specific problem, was not challenged in these suits.

[5] See Sections 101, 102, 123.

and similar instruments that are drawn on them and presented for payment, and to keep records of items which they receive for deposit or collection. 31 C.F.R. 103.34. The Regulations also require other financial institutions to maintain certain records pertaining to their customers and their accounts. 31 C.F.R. 103.33. However, there is no provision in Title I or elsewhere giving the government additional authority to inspect such records, and the amended Regulations expressly provide that such inspection is governed by other federal law. The court below upheld the constitutionality of these Title I recordkeeping provisions, and they are not involved in this appeal by the Secretary of the Treasury and the other defendants, although they are challenged by the plaintiffs in No. 72–985 and No. 72–1196.

(ii) Title II also has the same declared purpose of requiring records and reports which "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings" (Section 202). The approach is somewhat different, however, since it is largely aimed at transactions with foreign financial institutions which are not subject to the regulatory power of Congress. S. Rep. No. 91–1139, *supra,* pp. 3, 4. Section 241 gives the Secretary of the Treasury authority to require United States citizens, residents and businessmen who have bank accounts or other relationships with foreign financial institutions to maintain records and file reports regarding these relationships. Under the Regulations, such persons must report information concerning their accounts in foreign

financial institutions on their tax returns and an accompanying form (31 C.F.R. 103.24).

Section 231 of the Act requires the reporting of each transportation into or out of the United States of monetary instruments exceeding $5,000 in value on any one occasion.[4] The Regulations, however, exempt from the Section 231 reporting requirement each "transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments * * *" (31 C.F.R. 103.23(a)). The district court upheld the constitutionality of the provisions relating to reports of foreign bank accounts and imports and exports of monetary instruments (App. 77–79) and they are also not involved in the government's appeal.

(iii) The domestic currency transaction reporting provisions of Title II, which were struck down by the district court, are probably the least innovative features of the Bank Secrecy Act. Since 1945, financial institutions had been providing reports of their customers' large currency transactions, pursuant to regulations promulgated by the Secretary of the

[4] Section 231(a)(2) also requires a report where a person "receives monetary instruments [exceeding $5,000 in value] at the termination of their transportation to the United States from or through any place outside the United States." Section 203(*l*) defines the term "monetary instruments" to include "coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this title to which the regulation relates."

Treasury under Section 5(b) of the Trading With the Enemy Act (J.S. App. 89–91) and Section 251 of the Revised Statutes (App., *infra,* p. 44). These regulations required financial institutions to report all currency transactions that, in the judgment of the institution, exceeded those "commensurate with the [legitimate and] customary conduct of the business, industry or profession of the person or organization concerned" (31 C.F.R. 102.1). Mentioned particularly were transactions involving $1,000 or more in denominations of $50 or more,[7] or $10,000 or more in any denominations.[8] 31 C.F.R. (1949 ed.), Part 102 (10 Fed. Reg. 6556, App., *infra,* pp. 43–44. When these Regulations were revised in 1959, the Secretary noted the great value of these reports in disclosing income tax evasion by racketeers, narcotics dealers, foreign agents, and others engaged in illegal activities. In the fiscal years 1957 and 1958, for example, the Internal Revenue Service completed 129 fraud cases, involving additional tax and penalties of approximately $13,500,000, that originated from information contained in the TCR–1 currency reports. Treasury Release No. A–590, *supra.*

By 1970, the use of financial institutions, both domestic and foreign, in furtherance of criminal activities had markedly increased. H. Rep. No. 91–975, *supra,* p. 10; S. Rep. No. 91–1139, *supra,* pp. 2–3. Congress recognized the importance of reports of

[7] The amount was raised in 1952 to $2,500 in denominations of $100 or more. 17 Fed. Reg. 1822; 17 Fed. Reg. 2306.

[8] In 1959, the reporting form was simplified. Treasury Release No. A–590, August 3, 1959 (J.S. App. 127–129).

large and unusual currency transactions in discovering criminal activity and desired to strengthen the statutory basis for requiring such reports. H. Rep. No. 91–975, *supra,* pp. 11–12. In particular, Congress intended to authorize more definite standards for determining what constitutes the type of unusual transaction that should be reported. S. Rep. No. 91–1139, *supra,* p. 6; House Hearings, *supra,* p. 61.

In the statute as enacted, Congress determined to delegate to the Secretary the authority for specifying the currency transactions which should be reported. Section 221 provides:

> Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

Section 222 provides that the Secretary may require such reports from the domestic financial institution involved or the parties to the transactions, or both, and Section 223 authorizes the Secretary to designate financial institutions to receive such reports.

In his implementing Regulations, the Secretary made almost no use of the last two statutory authorizations, requiring only that *financial institutions* file the reports with the Commissioner of Internal Rev-

enue. The new Regulations are considerably more definite in scope, but not significantly broader than the repealed former Regulations.[9] They require that all deposits, withdrawals, exchanges, payments or transfers of currency [10] must be reported by the financial institution involved, except "transactions with an established customer maintaining a deposit relationship * * * in amounts * * * commensurate with the customary conduct of the business, industry or profession of the customer concerned." [11] 31 C.F.R. 103.22(*b*).

The form prescribed by the new currency transaction reporting regulations requires much the same severely limited information as did the old Form TCR–1, J.S. App. 130. The present Form 4789, J.S. App. 121, requests only (1) the name, address, busi-

[9] Instructions Relating to Reports of Currency Transactions, 31 C.F.R., Part 102, repealed effective July 1, 1972.

[10] The term "currency" is narrowly defined in the instructions accompanying Form 4789 and Section 103.11 of the Regulations to mean "The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It * * * does not include bank checks or other negotiable instruments not customarily accepted as money."

[11] The Regulations also provide that the names of all customers whose currency transactions in excess of $10,000 are not reported on Form 4789 must be reported to the Treasury on demand. Transactions with Federal Reserve Banks or Federal Home Loan Banks, or solely with or originated by financial institutions or foreign banks, are also excluded from these reporting requirements. Section 103.22. In addition, the Secretary may exempt in writing other transactions from the reporting requirements. Section 103.45 of the Regulations. As was the case under the old Regulations (31 C.F.R. 102.3), the new Regulations require that the financial institutions obtain identification from persons making transactions which must be reported (31 C.F.R. 103.26).

ness or profession and social security number of the person conducting the transaction; (2) similar information as to the person or organization for whom it was conducted, (3) a summary description of the nature of the transaction, the type, amount and denomination of the currency involved and a description of any check involved in the transaction; (4) the type of identification presented, and (5) the identity of the reporting financial institution.

While the regulations formulated by the Secretary pursuant to Sections 221–223 were thus very narrow, the district court proceeded to consider the constitutionality of the Act on its face and without regard to either the intention of Congress as to the manner in which the Act should be applied or the manner in which the Secretary had exercised his authority under the Act. The district court recognized that, if the Bank Secrecy Act authorized the adoption of regulations which compelled the production by banks of their "own records pertaining to the customer's financial transactions," the bank customers would "have no recognizable right to claim invasion of their privacy * * *" (App. 84). Although the only substantive regulation adopted by the Secretary which compelled disclosure by banks—the $10,000 currency transactions regulation—involved little more than submission of information from the banks' own records pertaining to the customers' financial transactions, the court struck down the provisions of Title II which authorized that regulation, as well as two related provisions, because these provisions allegedly could be administered in such a

way as to compel disclosure from a bank customer of details of every financial transaction he engages in by check.

The approach to Sections 221–223 taken by the district court is contrary to fundamental principles of constitutional adjudication which require that the constitutionality of statutes be determined not on the basis of speculation as to how they could conceivably be applied but on the manner in which they are actually being applied by those charged with their administration. This error was compounded by failure of the district court to examine the legislative history of the Bank Secrecy Act to determine whether a construction of Sections 221–223, consistent with both the intent of Congress and the Constitution, was possible. Moreover, the district court ignored the equally well established principle that the judicial power to determine the validity of executive or legislative action may be invoked only by persons in immediate danger of sustaining a direct injury as a result of that action.

Had the district court followed these basic principles, it would necessarily have concluded that Sections 221–223, as applied in accordance with the intent of Congress, do not violate the Fourth Amendment, and that the plaintiffs, who did not challenge the constitutionality of Sections 221–223 as applied or allege that they were in immediate danger of sustaining any direct injury as a result of the regulations adopted by the Secretary, were not entitled to the injunctive relief issued here.

The legislative history of Title II of the Bank Secrecy Act reveals, as its language indicates, that it was not intended to authorize the Secretary of the Treasury to require reports from bank customers of their ordinary personal checking transactions. The Secretary was authorized, instead, to require reports of unusual transactions involving currency or bearer instruments.

The Secretary's regulations require only that reports be filed by banking institutions (not bank customers) regarding *currency* transactions which are in excess of $10,000 and which do not involve "transactions with an established customer maintaining a deposit relationship * * * in amounts * * * commensurate with the customary conduct of the business industry or profession of the customer concerned." 31 C.F.R. 103.22(b).

Under the district court's own reasoning, these regulations as applied were not invalid under the Fourth Amendment (even assuming a properly framed complaint by legally aggrieved parties), nor do they pose an unreasonable burden on banking institutions. As the district court correctly held (App. 84), it is settled law:

> that communications between banks and their customers are not privileged communications in the technical sense of that term; that bank customers have no rights in bank records; that such records may be subpoenaed from the bank, even over the objection of the depositor, notwithstanding the fact that the records concern the customer's account; that customers

> have no standing to object to subpoenas requiring their bank to produce records of the customer's accounts and that the production by the bank of its records under subpoena is not, as to the customer, either a Fourth Amendment illegal search and seizure nor a Fifth Amendment self-incrimination.

Moreover, experience under similar regulations adopted pursuant to the Trading with the Enemy Act, as well as other evidence presented to Congress in support of the present Act, show that the Act and Regulations are reasonably related to the power of Congress to enact legislation to facilitate enforcement of federal criminal, tax and regulatory laws. The provisions here in question were enacted specifically for the purpose of providing "law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime." S. Rep. No. 91–1139, *supra,* p. 1. There can be little doubt that the domestic currency reporting provisions authorized by Title II and provided for by the Regulations are eminently useful for this purpose. The focus of these provisions is, of course, transactions involving unusual transfers of large sums of money. Evidence before Congress demonstrated that criminal activities frequently require large amounts of cash or result in the generation of large amounts of cash, that such activities can often be successful only if the necessary cash can be concealed, and that eventually the cash must be transformed into various forms of credit in order to be fully useful. The hearings on the Act also disclosed that domestic and foreign financial in-

stitutions were often used—sometimes unwittingly—as instruments for handling the large amounts of cash needed to facilitate complex criminal schemes. Congress had the power to adopt reasonable regulations intended to prevent banking institutions from thus becoming unwitting accomplices in illegal criminal enterprises.

II. THE DISTRICT COURT IMPROPERLY IGNORED THE ACTUAL CURRENCY REPORTING REGULATIONS AND ADJUDGED SECTIONS 221–223 UNCONSTITUTIONAL ON THE BASIS OF THE CONJECTURAL OUTER LIMITS OF HYPOTHETICAL REGULATIONS

In considering the provisions of the Act concerning domestic financial transactions, the district court entirely disregarded the Secretary's implementing Regulations, which set forth the reporting requirements under these statutory provisions. Although the Regulations require only financial institutions to report transactions (31 C.F.R. 103.22(a)), the district court analyzed the statutes involved as if reporting were required "by other parties to or participants in transactions with the institutions" (App. 80). Although under the Regulations the transactions that financial institutions must report are only those involving "currency," as distinguished from checks and drafts or other written orders (31 C.F.R. 103.11), the court analyzed these statutory provisions as if reporting were required "not only of currency transactions but of any transaction involving any monetary instrument" (App. 80). And, although the Regulations direct financial institutions to report only cur-

rency transactions involving more than $10,000 (31 C.F.R. 103.22(a)), the court below considered the statutory provisions as if there were a requirement to report all transactions "in any amount—large or small" (App. 80).

Thus, instead of adjudging the constitutionality of a statutory scheme, as implemented by regulations, that requires only financial institutions to report only certain currency transactions involving more than $10,000 (which is all that is actually in effect), the court undertook to decide the constitutionality of requiring financial institutions and all parties and participants in domestic transactions with these institutions to make reports of all such transactions, regardless of the monetary instrument or amount of money involved (App. 85). Indeed, the court went so far as to declare unconstitutional Section 223, which permits the Secretary to authorize banks to act as recipients of reports, even though the Regulations do not in any way implement this provision and it cannot now be known how, if at all, it will ever be implemented. The court broadly enjoined the Secretary and other defendants from enforcing or implementing Sections 221–223 of the Act, either pursuant to existing Treasury Regulations or pursuant to any broader or narrower Regulations which might be issued in the future (App. 95).

Assuming *arguendo* that Sections 221–223 could properly be given the broad interpretation postulated by the majority below, the court's method of constitutional adjudication seriously contravenes fundamental

principles long applied by this Court. Most importantly, this Court has often held that the constitutionality of Acts of Congress should not be decided on the basis of how such statutes might hypothetically be administered, but rather on the basis of how they are actually enforced by the appropriate executive officials. See, *e.g., Poe* v. *Ullman,* 367 U.S. 497; *Electric Bond Co.* v. *Securities and Exchange Commission,* 303 U.S. 419, 443. As the Court held in *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 324, the power of adjudication extends only so far as there is "action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining." Again, in *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 71–72, the same principle was expressed in somewhat broader terms:

> Merely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated. * * * No rule of practice * * * is better settled than "never to anticipate a question of constitutional law in advance of the necessity of deciding it." * * * In part, this principle is based upon the realization that, by the very nature of the judicial process, courts can most wisely determine issues precisely defined by the confining circumstances of particular situations. * * * In part it represents a conception of the role of the judiciary in a government premised upon a separation of powers, a role which precludes interference by courts with legislative and executive functions which have not yet pro-

ceeded so far as to affect individual interests adversely.

Moreover, it is an equally well "established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action * * *." *Ex parte Levitt*, 302 U.S. 633, 634; *Laird* v. *Tatum*, 408 U.S. 1, 13.

These basic rules of constitutional adjudication were reiterated only last Term in *Broadrick* v. *Oklahoma*, No. 71–1639, decided June 25, 1973, where persons who were concededly engaged in conduct subject to state regulation challenged the Oklahoma "little Hatch Act" on the ground that it might be applied to restrain conduct which is constitutionally protected.[12] The Court responded as follows (slip op. 9):

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. * * * A closely related principle is that constitutional rights are

[12] The Court has, of course, struck down statutes on occasion on grounds of "facial overbreadth," but, as noted in *Broadrick* (slip op. 10–14) this "exception to our traditional rules of practice" (*id.* at 14) applies only in narrow circumstances when the mere existence of an overly broad statute by itself has a chilling effect on free speech. And even in those cases the doctrine of "facial overbreadth" has been "employed by the Court sparingly and only as a last resort" (*id.* at 12).

> personal and may not be asserted vicariously. * * * These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. See *Younger* v. *Harris*, 401 U.S. 37, 52 (1971).

The district court here failed entirely to heed these rules in striking down Sections 221–223 as facially "repugnant" to the Fourth Amendment. Although these statutory provisions are not self-executing and merely authorize the Secretary of the Treasury to prescribe regulations requiring reports of transactions involving specified currency and monetary transfers, the court proceeded to render an essentially advisory opinion—at the behest of persons who failed to show that they have sustained or are in imminent danger of sustaining any direct injury as a result of the actual operation of the Act.

Since there are present none of the "weighty countervailing policies" (*United States* v. *Raines*, 362 U.S. 17, 22–23) which warrant such extraordinary relief in First Amendment cases (see *Broadrick* v. *Oklahoma*, *supra*, slip op. 10), and since there would be ample time for any aggrieved party to invoke the judicial power if and when the Secretary promulgated any regulation which violated the Constitution, it was entirely improper for the district court to entertain and decide a facial challenge to the constitutionality of the Bank Secrecy Act.

III. HAVING IMPROPERLY UNDERTAKEN TO RESOLVE THE CONSTITUTIONAL QUESTIONS ON THE BASIS OF "FACIAL OVERBREADTH," THE DISTRICT COURT COMPOUNDED ITS ERROR BY ADOPTING AN OVERLY BROAD CONSTRUCTION OF THE STATUTE

Even if it were assumed, *arguendo,* that the questions raised by the plaintiffs below as to the constitutionality of Sections 221–223 should have been decided on the basis of how the statute might hypothetically be applied, the district court's decision is nevertheless fundamentally erroneous. Where, as here, the validity of an Act of Congress is drawn in question and a serious doubt as to its validity is raised, "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson,* 285 U.S. 22, 62; see *United States* v. *Rumely,* 345 U.S. 41, 45–46; *Schneider* v. *Smith,* 390 U.S. 17, 26–27. Accordingly, this Court held last Term that the doctrine of facial overbreadth is not to be "invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick* v. *Oklahoma, supra,* slip op. 12. And in placing such a limiting construction on the Hatch Act, the Court stated: "As we see it, our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *United States Civil Service Commission* v. *National Association of Letter Carriers,* No. 72–634, decided June 25, 1973 (slip op. 22).

Totally ignoring this well-established principle, the district court took precisely the opposite approach—*i.e.*, it based its finding of constitutionally impermissible overbreadth on its own unnecessarily broad reading of the statutory language as permitting the Secretary to make demands for detailed reports of all domestic financial transactions, including copies of personal checks. Indeed, a narrower construction of the statute here is not only possible, it is all but compelled by both the language and the legislative history of the provisions in question.

Nothing in the language of Sections 221–223 purports to give the Secretary any specific power to demand reports of all domestic financial transactions, including personal checks. As the headings of Title II of the Act, Chapter 2 of Title II, and Section 221 themselves suggest, the focus of this reporting requirement is on *currency* transactions. Specifically, the statute authorizes the imposition of a reporting requirement only in the case of transactions involving the "payment, receipt or transfer of United States currency, or such other monetary instruments as the Secretary may specify." The term "monetary instruments" is not an open-ended term encompassing any financial instrument, but is specifically defined by Section 203(*l*) as encompassing only

> * * * coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof,

as the Secretary may by regulation specify for the purposes of the provision of this title to which the regulation relates.

The legislative history indicates that the "monetary instruments" Congress had in mind were currency and "near currency"—*i.e.*, instruments which are capable of being used as the equivalent of currency in order to transfer credit without leaving any record or trace as to the transaction or the identity of the participants. The bill as introduced applied (in both its domestic currency transaction and foreign currency transportation provisions) only to United States currency, but its application was expanded at the behest of the Department of the Treasury in order "to close a potential loophole through which reporting requirements could be avoided by not using U.S. currency but rather its equivalent." Senate Hearings, *supra*, p. 183; see House Hearings, *supra*, pp. 151, 152. The modifications proposed by the House Committee on Banking and Currency included a definition of the term "monetary instruments" which is broader than that eventually adopted in Section 203. That definition would have made the provisions applicable to transactions involving foreign and United States coin and currency and "such types of checks, bills, notes, bonds, stock transferable by delivery, or other obligations or instruments as the Secretary may by regulation specify." H. Rep. No. 91-975, *supra*, p. 5. In discussing this change, the Committee noted that the definition might theoretically reach as far as personal checks, but it cautioned that "It is not the intention of your committee * * * that this broadened authority

be expanded any further than necessary to cover those types of bearer instruments which may *substitute for currency.*" H. Rep. No. 91-975, *supra,* p. 22 (emphasis added).

The further modifications reflected in the final legislation were again suggested by the Department of the Treasury for the express purpose of providing a more restrictive definition in line with this express intent of the House Committee. Congress deleted "checks" from the definition of monetary instruments and indicated its desire to cover only certain specified bearer instruments (travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery) or *"their equivalent thereof* as the Secretary may by regulation specify for the purpose of the provision of this title [Section 221] to which the regulation relates [emphasis added]." The reference to the "equivalent" of the specified bearer instruments was plainly intended only to authorize the Secretary of the Treasury to include other instruments, which might be devised to avoid the reporting requirements, that would be negotiable "without leaving a record of the chain of ownership." Senate Hearings, *supra,* p. 183.

Thus, the legislative history shows a congressional intent to prevent circumvention of the *currency* reporting requirements through the use of instruments which are the equivalent of currency. As to the use of personal checks as a means of transferring credit, Congress was content to rely on the recordkeeping provisions of Title I under which banks would be required to retain microfilm copies and records of their

deposit and collection.[13] In sum, though Congress gave the Secretary a measure of discretion in determining the precise scope of the domestic currency and near-currency transaction reporting requirement, it clearly did not envision a reporting requirement differing in kind from that imposed under the pre-existing Treasury Regulations issued under Revised Statutes, Section 251, and the Trading with the Enemy Act. The district court therefore erred in analyzing the constitutionality of the statute on the basis of the kind of intrusion into personal financial affairs which would occur if the Secretary were to require routine disclosure of *all* information shown on the face of *all* personal checks. Congress intended that access to such items, which are the specific subject of the recordkeeping requirements of Title I, would continue to be governed by established legal process, and that the new legislation would not authorize unlimited fishing expeditions into the affairs of bank customers. See S. Rep. No. 91-1139, *supra*, p. 5. The hypothetical application of the statute feared by plaintiffs and the district court is not authorized by the statute; any attempt to impose such a pervasive financial transaction reporting requirement (and there is no reason to predict that any such attempt will occur) would be subject to challenge,

[13] This, of course, does not foreclose the possibility that bank checks or drafts might be drawn and used in such a way, for example, as to enable large amounts of credit to be transferred abroad without leaving any trace of the transactions involved, or that the Secretary might properly determine that such instruments constitute "monetary instruments" for the purpose of some or all of the provisions of Title II. However, routine personal checks which are not drawn or used in such a way seem clearly beyond the scope of the Title II reporting requirements.

not on constitutional grounds (which need not be reached), but on the ground that such a requirement exceeded the Secretary's statutory authority.[14]

IV. AS APPLIED BY THE SECRETARY OF THE TREASURY, SECTIONS 221–222 OF THE BANK SECRECY ACT ARE CONSTITUTIONAL

1. The regulations adopted by the Secretary of the Treasury pursuant to Sections 221 and 222 [15] do not violate the Fourth Amendment or infringe on any other constitutional right of the plaintiffs. We have shown in the Statement, *supra,* that none of the plaintiffs specifically alleged in the complaints that the regulation which requires reports of currency transactions in excess of $10,000 violated the Fourth Amendment or that it even purported to authorize a "search or seizure" within the meaning of the Fourth Amendment.[16] Moreover, even under the rationale of

[14] The application here of the foregoing established principles of constitutional adjudication makes it unnecessary to consider whether Sections 221–223 are facially repugnant to the Fourth Amendment. We submit, however, that, whatever other claims may be asserted by either the banks or bank customers, the delegation to the Secretary of the Treasury of authority to compel disclosure of information relating to transactions involving currency or specified bearer transactions—or their equivalent—does not constitute a search or seizure, much less an unreasonable search or seizure.

[15] As previously noted (*supra*, p. 20), the other provision struck down by the court below, Section 223, is not self-executing and has not been implemented by any regulation adopted by the Secretary.

[16] Plaintiffs and the district court recognized the limited scope of the $10,000 domestic currency reporting regulation, but contended that under Section 103.45 the Secretary may impose additional reporting requirements by means of a simple

the district court, it is plain that, as applied by the Secretary, the $10,000 currency regulation does not impinge upon any Fourth Amendment right of bank customers. The court below recognized that "bank customers have no recognizable right to claim invasion of their privacy merely because a government agency, by summons or subpoena, requires a bank to produce the bank's own records pertaining to the customer's financial transactions" (App. 84). But, the court reasoned, "a bank customer reasonably expects privacy concerning details of his personal financial affairs not shown on either the bank's own records or on the face of the customer's checks and which must be disclosed only by the report required of the bank customer, himself, as a party to or participant in a financial transac-

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written order. Initially, the principle limiting constitutional challenges to statutes as actually implemented and narrowly construed precludes consideration of this contention here, since no written order expanding the currency reporting provisions has ever been issued. It is true that Section 103.45 as originally promulgated provided that the Secretary could by written order or authorization make exceptions to, grant exemptions from, expand by additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part.

The "additional * * * requirements" provision was merely intended to allow the Secretary in appropriate cases to substitute one type of compliance for another—for example, to require lists of currency transactions rather than individual reports. It was never intended that this authority would be used to expand the substantive scope of the Regulations without following the notice and hearing provisions of the Administrative Procedure Act. In any event, if the offending phrase was too broad, the proper response of the court below was to strike it, not to declare the three statutes unconstitutional. Moreover, the question is now moot, since the offending phrase has been deleted from the regulation.

tion" (App. 86). And it was only as to this possible application of the Act that the Fourth Amendment guarantees were held to be applicable.

The Bank Secrecy Act, as applied by the Secretary of the Treasury, however, requires only reports by banks (not bank customers), involving only information from "the bank's own records." Since the Act as construed and applied by the Secretary does not even involve reports regarding "customer's checks" or that any information be supplied by the customer at all, under the rationale of the district court the Act as applied (which is all the court should have addressed) is not invalid under the Fourth Amendment.

2. Largely ignoring the omissions in their complaints and the reasoning of the district court, the California Bankers Association argued in its motion to affirm (pp. 9–10):[17]

> The Bank Secrecy Act and regulations would, at this writing, compel banks and other financial institutions to report, automatically, all domestic currency transactions involving $10,000 or more. If, as we believe, a bank customer expects privacy when he initiates a $10,000 domestic currency transaction, he would seem to be entitled to the protection of the Fourth and Fifth Amendment. But even if we reject an assumption of privacy in bank-customer relations, the Act's automatic reporting provisions are singularly unreasonable. There is simply no certain or even probable connection

[17] The other plaintiffs filed no response to the jurisdictional statement.

between a $10,000 domestic currency transaction and the commission of a crime.

a. The assertion that the $10,000 currency regulation violates the Fourth Amendment rights of bank customers who engage in transactions subject to the reporting requirements prescribed by the Secretary is premature and without substance.

We first reemphasize here the "established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action * * *." *Ex parte Levitt,* 302 U.S. 633, 634; *Laird* v. *Tatum,* 408 U.S. 1, 13. The bank customer plaintiffs here [18] made no allegation that they have in the past engaged in the unusual type of transaction subject to the regulations' reporting requirements or that they would be likely to engage in such action in the future. They have, therefore, failed to make any showing that they are "immediately in danger of sustaining a direct injury as the result of that action * * *." [19]

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[18] The California Bankers Association, of course, has no standing to assert claims vicariously on behalf of bank customers.

[19] By contrast, in challenging the regulations requiring reports of certain foreign monetary transactions, the individual plaintiffs alleged that they each "maintain a financial interest in and signature authority over one or more bank accounts in foreign countries" (App. 65), or that the complainant has "repeatedly in the recent past transported, mailed or shipped * * * one or more monetary instruments exceeding $5,000 in value from the United States to places outside the United States and expects to have reason to do so again in the near future" (App. 64–65).

Moreover, even a bank customer who could establish standing to challenge the regulations could not successfully maintain that requiring disclosure by the bank of information necessarily disclosed by him to the bank during a commercial banking transaction constitutes a search or seizure of him or of his possessions. Since the information comes from the bank's own records, no seizure of any tangible or intangible property of the bank customer is involved.

While it was held in *Katz* v. *United States,* 389 U.S. 347, that the electronic interception of verbal conversations comes within the Fourth Amendment's proscription against unreasonable searches and seizures, it has never been suggested that the disclosure of the contents or of the nature of a conversation by one party constitutes an unreasonable search or seizure of the other party. A party to a private telephone conversation may have a reasonable expectation that the conversation will not be electronically intercepted without his knowledge by law enforcement officers, but he cannot rely for exclusionary purposes on any expectation that the other party to the conversation will not disclose the contents of the conversation (see *United States* v. *White,* 401 U.S. 745) or, in the absence of privilege, that the other party will not be compelled to do so pursuant to a grand jury subpoena or other lawful process. As the Court held in *Branzburg* v. *Hayes,* 408 U.S. 665, 682:

> Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen

from disclosing to a grand jury information that he has received in confidence.

Any such expectation of privacy would be particularly unreasonable here, where the transactions at issue are with institutions subject to a panoply of regulatory statutes which involve extensive recordkeeping and reporting requirements. See, *e.g.*, *Donaldson* v. *United States*, 400 U.S. 517, 522; *Harris* v. *United States*, 413 F. 2d 316 (C.A. 9); *Galbraith* v. *United States*, 387 F. 2d 617 (C.A. 10); *United States* v. *Cleveland Trust Co.*, 474 F. 2d 1234 (C.A. 6); *Fifth Avenue Peace Parade Committee* v. *Gray*, 480 F. 2d 326, 332 (C.A. 2).

b. Similar considerations require rejection of the purported Fifth Amendment claim asserted on behalf of the bank customers. The regulations clearly do not compel any of the plaintiffs or any bank customer to supply any information or incriminatory evidence. As the Court held in *Couch* v. *United States*, 409 U.S. 322, 328:

> It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him. As Mr. Justice Holmes put it: "A party is privileged from producing the evidence but not from its production." *Johnson* v. *United States*, 228 U.S. 457, 458 (1913). The Constitution explicitly prohibits compelling an accused to bear witness "against himself": it necessarily does not proscribe incriminating statements elicited from another. Compulsion upon the person asserting it is an important element of the privilege, and "prohibition of compelling a man * * *

> to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from *him*," *Holt* v. *United States*, 218 U.S. 245, 252–253 (1910) (emphasis added). It is extortion of information from the accused himself that offends our sense of justice."

c. The claim that the $10,000 currency transaction reporting requirement is "singularly unreasonable" is also without substance.

The manner in which the California Bankers Association has framed its challenge to the regulation evidences its recognition that the Fourth Amendment, "if applicable" at all here, protects only against unreasonable demands for disclosure of records. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208. As the Court held in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652:

> [C]orporations can claim no equality with individuals in the enjoyment of a right of privacy. * * * They are endowed with public attributes.

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[20] The Fifth Amendment claim is also premature. The individual appellants who claim to be affected by the operation of Title II made no allegation in their complaint that compliance with the Act would require them to incriminate themselves and none of the other complainants raised such a claim. "The privilege against self-incrimination is one which normally must be claimed [only] by the individual who seeks to avail himself of its protection." *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 107. Moreover, even if the reports were required of the customers of financial institutions, which is not the case, they could properly assert their Fifth Amendment claim only in an action to compel them to make a report, not in a declaratory judgment action such as this. *Haynes* v. *United States*, 390 U.S. 85, 99; *Bowes* v. *Commission to Investigate Allegations of Police*, 330 F. Supp. 262 (S.D. N.Y.).

> They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation.

In any event, as Judge Learned Hand held for the court in *McMann* v. *Securities and Exchange Commission,* 87 F. 2d 377, 379 (C.A. 2), the Fourth Amendment does not forbid the government from requiring information on individual accounts from financial institutions—here the currency reports—unless the demand "is out of proportion to the end sought." Accord: *Shapiro* v. *United States,* 335 U.S. 1, 32–33.

No reason is suggested why the limited requirements at issue here are not a reasonable exercise of the power of Congress to assure that the channels of interstate commerce are employed in a manner which will facilitate rather than jeopardize or hinder enforcement of the law, and of its power to enact laws necessary and proper for the enforcement of federal criminal, tax and regulatory laws. Indeed, the need for precisely the kind of disclosure requirements at issue here was strongly indicated in the course of the Bank Secrecy Act's extensive legislative history.[21]

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[21] It has not been suggested that the reporting requirement places an undue burden on the banks. While the district court enjoined the enforcement of Sections 222–223 of the Bank Secrecy Act, experience under the Trading with the Enemy Act, in the last seven years prior to the adoption of the Bank Secrecy Act, indicated that an average total of fewer than 20,000 covered transactions were reported annually by all banking institutions in the United States.

The provisions here in question were enacted specifically for the purpose of providing "law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime." S. Rep. No. 91-1139, *supra*, p. 1. There can be little doubt that the domestic currency reporting provisions authorized by Title II and provided for by the Regulations are eminently useful for this purpose. The focus of these provisions is, of course, transactions involving unusual transfers of large sums of money. The testimony before Congress of the Assistant Attorney General in charge of the Criminal Division of the Department of Justice indicated that criminal activities frequently require large amounts of cash or result in the generation of large amounts of cash, that such activities can often be successful only if the necessary cash can be concealed, and that eventually the cash must be transformed into various forms of credit in order to be fully useful. See Senate Hearings, *supra*, p. 65. The hearings also disclosed that domestic and foreign financial institutions were often used—sometimes unwittingly—as instruments for handling the large amounts of cash needed to facilitate complex criminal schemes. See, *e.g.*, House Hearings, *supra*, pp. 25–26, 66–67, 68, 91. For example, in numerous instances domestic banks were used by non-customers for the purpose of transferring cash to secret foreign accounts used to evade United States tax and securities laws. Indeed, former United States Attorney Robert Morgenthau estimated that hundreds of millions of dollars of United States funds were deposited in secret foreign accounts for illegal purposes. House Hearings, *supra*, p. 91. Such testi-

mony formed the basis of an express finding by the House Committee that (H. Rep. No. 91-975, *supra*, p. 11):

> Criminals deal in money—cash or its equivalent. The deposit and withdrawal of large amounts of currency or its equivalent (monetary instruments) under unusual circumstances may betray a criminal activity. The money in many of these transactions may represent anything from the proceeds of a lottery racket to money for the bribery of public officials.[22]

The utility of such a currency transaction reporting requirement was not merely a matter of expert opinion, but was affirmatively established by the experience under the requirements imposed since 1945 under the authority of the Trading With the Enemy Act. In 1959, the Treasury Department noted the valuable assistance such reports had provided in tax evasion cases. It was indicated that the Internal Revenue Service had completed 129 cases in 1957 and 1958 alone, involving additional tax and penalties of approximately $13,500,000, which were originated from information received pursuant to such reporting requirements. Treas. Release No. A-590, J.S. App. 127-129.

Of course, not every bank transaction involving cash—nor even every bank transaction involving large amounts of cash—involves questionable activity. And

[22] Measures designed to control currency transactions are the subject of further proposed legislation pending before the present Congress. For example, at least four bills are pending which would limit cash contributions to political campaigns and/or cash expenditures by candidates. S. 1936, 93d Cong., 1st Sess., S. 2086, 93d Cong., 1st Sess.; H.R. 10048, 93d Cong., 1st Sess.; H.R. 10463, 93d Cong., 1st Sess.

the regulations accordingly do not require reporting in the case of every cash transaction or even every large transaction. Instead, what is reached is every large currency transaction (over $10,000) which might be deemed unusual under the circumstances—*i.e.*, transactions by persons having no established customer relationship with the bank, or transactions by established customers in an amount unusually large for such persons. Thus, the requirement is not unduly broad, but is narrowly directed to the category of transactions that is most likely to be indicative of questionable activity. Indeed, it is difficult to see how the requirement could be drawn any more narrowly unless the burden of reporting were defined in terms of actual suspicion on the part of bank officials as to the legitimacy of the transaction. While overtly suspicious transactions might well be reported in any event, it is not ordinarily the province of bank officials to inquire as to the purpose of their customers' bank transactions; the legislation and regulations, accordingly, were intended to remove the subjective element as much as possible from the reporting requirement and to establish more definite standards for determining the type of unusual transactions to be reported. See S. Rep. No. 91-1139, *supra*, p. 6.

Moreover, the utility of the reporting provisions becomes even more apparent when they are viewed in context as a part of the entire Bank Secrecy Act. Title I requires financial institutions to maintain records so that they will be available for subpoena or summons by law enforcement officials. But the effectiveness of these provisions, which the district court upheld (App. 76-77), depends on whether those engaging in illegal

activities use written instruments such as checks and on whether the investigatory agencies know of the financial institutions with which they deal. Reports by financial institutions of large currency transactions by nonestablished customers prevent underworld figures from evading the effect of the Title I record-keeping provisions and supply leads for determining which records should be summoned or subpoenaed.

The currency reporting provisions also increase the effectiveness of the Title II provisions requiring reports of persons who transfer currency in excess of $5,000 into or out of the country, or who maintain relationships with foreign financial institutions. See 31 C.F.R. 103.23, 103.24, J.S. App. 96–98.

Although the covert physical transportation of currency into or out of the United States constitutes a key element in effecting the conversion of cash into usable credit, there was considerable testimony before the congressional committees that domestic financial institutions are also often unknowingly involved in transfers and transactions designed to accomplish one step or another in more sophisticated and complex conversion procedures. See, *e.g.*, House Hearings, *supra*, pp. 25–26, 66–67, 68, 90–91; Senate Hearings, *supra*, pp. 280–281. To the extent that large domestic currency transactions, which often mark the beginning or end of these conversion procedures, are not reported and remain secret, the foreign currency reporting provisions become easier to circumvent.

Accordingly, we submit that Sections 221–223 as applied are reasonably related to a legitimate congressional purpose and do not impose an unreasonable burden on the banks.

d. The First Amendment claim raised by the American Civil Liberties Union complaint, and not considered below, appears to have been based largely on the overly broad reading of the statute erroneously adopted by the district court rather than the requirements actually imposed by the Regulations. Relying on cases such as *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, the ACLU contended that the reporting requirement, if extended to personal checks, would disclose membership of and contributions to controversial organizations, thereby chilling the exercise of the First Amendment right of free association.[23] But, as we pointed out above, pp. 25–28, the reporting requirement actually imposed by the Regulations does not extend to personal checks or the like, and it is extremely doubtful that the statute could properly be construed as authorizing the Secretary to require reports of such items. And even if it could be assumed that the American Civil Liberties Union or its members and contributors regularly engage in the currency transactions made reportable under the Act, there is no basis for believing that the reports would be used to suppress the organization or its members or that they would result in public disclosure of protected associational relationships. The possible chilling effect on First Amendment rights is thus so remote as to be virtually nonexistent, at least under the domestic currency transaction reporting provisions of the statute as now administered. Here, as in *Laird* v. *Tatum,* 408 U.S. 1, mere allegations of a subjective chilling of

[23] See ACLU Plaintiffs' Memorandum of Points and Authorities re: Temporary Restraining Order, pp. 44–51.

First Amendment rights do not give rise to a justiciable issue "absent actual present or immediately threatened injury resulting from unlawful governmental action." 408 U.S. at 15.

CONCLUSION

For the reasons stated, the judgment of the district could should be reversed insofar as it grants injunctive relief with respect to the enforcement or implementation of Sections 221–223 of the Act.

Respectfully submitted.

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APPENDIX

31 C.F.R., Part 102

PART 102—INSTRUCTIONS RELATING TO REPORTS OF CURRENCY TRANSACTIONS

§ 102.1 *Reports of currency transactions required.*

Commencing with transactions occurring in the month of August 1959, every financial institution in the United States shall file monthly reports on Form TCR–1 concerning each deposit or withdrawal, or other payment or transfer, effected by, through, or to such financial institution, which involves transactions in United States currency as follows:

(a) Transactions involving $2,500 or more of United States currency in denominations of $100 or higher;

(b) Transactions involving $10,000 or more of United States currency in any denominations, and

(c) Transactions involving any amount in any denominations,

which in the judgment of the financial institution exceed those commensurate with the customary conduct of the business, industry or profession of the person or organization concerned.

§ 102.2 *Filing of reports.*

Reports on Form TCR–1 shall be filed on or before the 15th day of the month following that in which the reported transactions occur, with the Federal Reserve Bank of the district in which the reporting financial institution is located. All information called for in

such form shall be furnished. A supply of Form TCR–1 may be obtained upon request directed to any Federal Reserve Bank.

§ 102.3 *Identification required.*

No financial institution shall effect any transaction with respect to which a report is required unless the person or organizations with whom such transaction is to be effected has been satisfactorily identified.

§ 102.4 *Definitions.*

As used in this part "payment or transfer" shall include exchange of currency; and "financial institutions" shall mean banks, trust companies, savings banks, private bankers, investment bankers, building and loan associations, securities and commodities brokers, and currency exchanges and other persons or organizations engaged primarily in cashing checks and exchanging currency.

Revised Statutes:

Sec. 251. The Secretary of the Treasury shall make and issue from time to time such instructions and regulations to the several collectors, receivers, depositaries, officers, and others who may receive Treasury notes, United States notes, or other securities of the United States, or who may be in any way engaged or employed in the preparation and issue of the same, as he shall deem best calculated to promote the public convenience and security, and to protect the United States, as well as individuals, from fraud and loss.

[31 U.S.C. 427.]

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